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No. 82-786

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN DOE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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This case presents two principal questions: first, whether the Fifth Amendment privilege against compelled self-incrimination protects the *contents* of business records voluntarily prepared prior to the issuance of a subpoena seeking their production; and second, whether such a subpoena may be resisted on the ground that the *act of producing* those records would amount to testimonial self-incrimination even though the government has warranted not to make any use of the act of production.

A.

With respect to the first question—whether the contents of preexisting business records are privileged—we are merely asking the Court to follow its

reasoning in *Fisher* v. *United States*, 425 U.S. 391 (1976). As we explained in our opening brief (at 13-15), *Fisher* was based upon the principle that the Fifth Amendment privilege does not protect the contents of documents that were voluntarily prepared. The Court in *Fisher* wrote (425 U.S. at 409-410) (footnote omitted):

> [A]s far as the record demonstrates, the preparation of all of the papers sought in these cases was wholly voluntary, and they cannot be said to contain compelled testimonial evidence, either of the taxpayer or of anyone else. The taxpayer cannot avoid compliance with the subpoena merely by asserting that the item of evidence which he is required to produce contains incriminating writing, whether his own or that of someone else.

Respondent seeks (Br. 15) to distinguish *Fisher* from the present case on only one ground: ownership of the papers in question. But as shown in our opening brief (at 21-22), this distinction is irrelevant for Fifth Amendment purposes. If ownership were the determinative factor, the result in *Fisher* would presumably have been different if the taxpayers had purchased the papers from their accountants for nominal consideration. We cannot believe that the application of the Fifth Amendment privilege turns on such fine distinctions of property law.

Furthermore, ownership of subpoenaed records bears little relationship to the asserted purpose of the Fifth Amendment privilege upon which respondent's argument (Br. 15-16) rests: protection of personal privacy. Just because an individual owns documents —whether the collected works of Shakespeare or a

business ledger—does not mean that they fall within a protected "zone of privacy."

In any event, "[t]he proposition that the Fifth Amendment protects private information obtained without compelling self-incriminating testimony" was expressly rejected in *Fisher* (425 U.S. 400) and is inconsistent with modern Fifth Amendment law. For example, if immunity is granted, the Fifth Amendment does not prevent a witness from being compelled to divulge the most private information. *Kastigar* v. *United States*, 406 U.S. 441 (1972). Similarly, the Fifth Amendment privilege does not proscribe a search or electronic surveillance that reveals private matters. *Andresen* v. *Maryland*, 427 U.S. 463, 470 (1976); *Katz* v. *United States*, 389 U.S. 347, 354 (1967).

Respondent attempts (Br. 16) to distinguish *Andresen* based upon "the compulsion present when one is served with a subpoena as opposed to [the] lack thereof when a search warrant is involved." This difference, however, has nothing to do with whether the *contents* of documents are privileged. When a document subpoena is issued, the witness is called upon to produce the documents, and he may thus argue that the act of production amounts to testimonial self-incrimination. In the case of a search, there is no compelled act of production, and consequently no such argument can be made. But in both cases, the *contents* of the documents are the same, and there is no reason why the contents should be privileged in one situation but not in the other.

Finally, respondent's claim (Br. 8-17) that a subpoena for standard business records implicates important privacy interests rings hollow. As Judge Friendly has aptly put it, the types of documents in-

volved in this case—such as business ledgers, vouchers, and invoices (see Pet. App. 33a, 35a)—"are not the outpouring of an individual's soul." Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. Cinn. L. Rev. 671, 703 (1968).

In light of respondent's emphasis upon privacy, we reiterate that the subpoenas in this case called for the production of only common types of business records and not papers of a more personal nature. As in *Fisher* (425 U.S. at 401 n.7), "[s]pecial problems of privacy which might be presented by subpoena of a personal diary" or similar papers are not at issue here.

B.

1. The second chief question in this case concerns the act of producing the subpoenaed documents. While *Fisher* made clear that the contents of preexisting business records are not privileged under the Fifth Amendment, it left open the possibility that the act of producing such documents might be considered testimonial, either because it concedes their possession or control by the witness or because it tacitly authenticates them (see 425 U.S. at 410). In the wake of *Fisher*, witnesses have seized upon this idea as a way of circumventing *Fisher's* conclusion with respect to the contents of preexisting business documents, and courts openly hostile to *Fisher's* logic—like the court of appeals in the present case[1]—have

[1] Although *Fisher* stated (425 U.S. at 409) that *Boyd's* "prohibition against forcing the production of private papers has long been a rule searching for a rationale consistent with the proscriptions of the Fifth Amendment against compelling a person to give 'testimony' that incriminates him," the court of appeals in this case asserted (Pet. App. 11a n.7) that "lower federal courts, including this Court, have continued to recognize *Boyd's* protection-of-private-papers principle."

adopted their arguments. While we accept and are prepared to deal with the possibility that the act of producing documents might amount to testimonial self-incrimination, it is abundantly clear that this possibility is ordinarily more theoretical than real and is seldom the real reason why a witness resists a subpoena duces tecum. If witnesses like respondent were really concerned about the act of producing documents, rather than the documents' unprivileged contents, they would have little incentive to resist the government's efforts to immunize the act of production. Instead, however, witnesses like respondent have made every effort to avoid the government's attempts to confer act-of-production immunity. In cases like this, what the prosecution wants, and what the witness fervently wants to prevent, is revelation of the documents' unprivileged contents.

2. The act of production in *Fisher* was held not to amount to testimonial self-incrimination (425 U.S. at 410-413). As explained in our opening brief (at 31-43), we think the same is true here with respect to most, if not all, of the subpoenaed documents. However, since making prosecutive use of the act of producing the documents is of no real interest to the government, we have been quite prepared to agree in exchange for receiving the documents that the act of production should be immunized.

In his brief, respondent does not dispute the principle that preventing prosecutive use of the act of production precludes any Fifth Amendment objection based upon that act. Nor does he quarrel with our contention (Br. 43-46) that barring use of the act of production in any subsequent criminal proceedings, as

opposed to a formal grant of immunity, is sufficient.[2] Instead, his only objection (Br. 21) is that the government's immunity offer in district court was not

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[2] We see no obstacle to recognition of this type of immunity. The court of appeals' suggestion (Pet. App. 19a) that immunity may not be granted without statutory authorization is contrary to the established rule that if a witness is compelled to testify despite a valid Fifth Amendment objection "his answers are inadmissible against him in a later criminal prosecution." *Lefkowitz* v. *Turley*, 414 U.S. at 78; see also *Shotwell Mfg. Co.* v. *United States*, 371 U.S. 347, 347 (1963); *Adams* v. *Maryland*, 347 U.S. 179, 181 (1954) ("a witness does not need any statute to protect him from the use of self-incriminating testimony he is compelled to give over his objection. The Fifth Amendment takes care of that without a statute").

Moreover, it is common practice for federal prosecutors to agree, often as part of a plea bargain calling for the defendant to testify, that such testimony will not be used against the defendant in any way. Such promises generally have been held to be enforceable. *E.g.*, *United States* v. *Rodman*, 519 F.2d 1058 (1st Cir. 1975); *United States* v. *De Sena*, 490 F.2d 692, 694 (2d Cir. 1973); *United States* v. *Carter*, 454 F.2d 426, 427-428 (4th Cir. 1972); *United States* v. *Sanderson*, 498 F. Supp. 273, 276 (M.D. Fla. 1980). See *Santobello* v. *New York*, 404 U.S. 257, 263 (1971) (plea bargain enforceable). But see *United States* v. *D'Apice*, 664 F.2d 75, 77-78 (5th Cir. 1981). Cf. *Whiskey Cases*, 99 U.S. 594 (1878) (prosecutor's promise not bar to civil action but provides "equitable right" to executive clemency). Such informal immunity agreements have also been held to be consistent with 18 U.S.C. 6001-6005 and within the prosecutor's authority. *E.g.*, *United States* v. *Winter*, 663 F.2d 1120, 1133 (1st Cir. 1981), cert. denied, Nos. 81-1249, 81-1392 & 81-1394 (Feb. 28, 1983); *United States* v. *Librach*, 536 F.2d 1228, 1230 (8th Cir.), cert. denied, 429 U.S. 939 (1976). But see, *e.g.*, *In re Corrugated Container Antitrust Litigation*, 662 F.2d 875, 887-888 (D.C. Cir. 1981).

Finally, in *Simmons* v. *United States*, 390 U.S. 377, 393-394 (1968), the Court protected the Fourth and Fifth Amendment rights of a defendant wishing to testify at a suppression hearing by prohibiting the introduction of his testimony at trial over his objection. There is, accordingly, ample precedent for

"coextensive with respondent's Fifth Amendment right." This objection is both factually mistaken and beside the point.

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non-statutory immunity designed to protect Fifth Amendment rights.

We recognize that in *Pillsbury Co.* v. *Conboy*, No. 81-825 (Jan. 11, 1983), slip op. 14, and *Maness* v. *Meyers*, 419 U.S. 449, 461-463 (1975), the Court did not accept the argument that a witness who claimed the Fifth Amendment privilege in a civil proceeding should be compelled to testify because any wrongfully compelled testimony would be inadmissible in a subsequent criminal case. But the situation in those cases was different in a critical respect; as noted in *Pillsbury Co.* (slip op. 14), compelling testimony and thereby conferring constructive use immunity without the government's consent "would be inconsistent with the congressional policy of leaving the granting of immunity to the Executive Branch." By following such a procedure, a court might unwittingly create taint problems that could jeopardize future prosecutions. In the present case, by contrast, the government has requested the immunity grant.

Constructive act of production immunity would free the government from compliance with the procedures mandated by 18 U.S.C. 6001-6005. See, *e.g.*, 18 U.S.C. 6003(b) (requiring approval of Attorney General, Deputy Attorney, or designated Assistant Attorney General when immunity given in court or grand jury proceedings); 18 U.S.C. 6004(a) (requiring Attorney General's approval in administrative proceedings). But the purpose of those procedures is not to protect the witness, whose Fifth Amendment rights are fully protected by a grant of use immunity irrespective of the internal government procedures followed before such immunity is conferred. Instead, the purpose of the statutory procedures is to prevent immunity grants that might jeopardize pending or future prosecutions by making it difficult for the government to demonstrate that its evidence derived from other sources. See, *e.g.*, *Measures Relating to Organized Crime: Hearings on S. 30, S. 974, et al. Before the Subcomm. on Criminal Laws and Procedures of the Senate Comm. on the Judiciary*, 91st Cong., 1st Sess. 386 (1969) (statement of Justice Depart-

It is mistaken because the government made clear in district court that it would agree, should respondent be prosecuted, not to use his act of production against him in any way. For example, one of its briefs stated: "[T]he government has already agreed on the record not to use the act of production against [the witness] in any manner, the functional equivalent of use immunity." [3] Memorandum in Support of Motion for Reconsideration at 21-22.[4]

Respondent's objection is beside the point for two reasons. First, it fails to address our argument that his Fifth Amendment rights will be fully protected

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ment). This concern is far less important where only act-of-production immunity is extended because, as previously noted, the significance of the testimony inherent in the act-of-production is generally slight. In addition, because use immunity for testimony is granted sparingly, the statutory procedures are not unduly burdensome in that context, whereas Fifth Amendment objections to subpoenaes duces tecum are common.

[3] We are lodging a copy of this memorandum with the Court.

[4] Neither of the courts below rejected the government's immunity offer on the ground that it was less extensive than respondent's Fifth Amendment privilege. The district court initially rejected our offer not to use respondent's act of production against him in any way because the court was unconvinced that "the existence, possession and authenticity of the documents can be proved without Mr. [Doe's] testimonial communication" (Pet. App. 26a). (In our view, possible gaps in the government's proof if act-of-production immunity is granted provide no basis for a witness to resist such immunity). Our motion for reconsideration, which presented our immunity argument more fully, was denied without opinion (J.A. 17; C.A. App. 135a).

The court of appeals rejected the government's immunity argument (Pet. App. 19a-20a) because statutory immunity was not offered and because "no procedure was ever agreed upon." We addressed the court of appeals' reasoning in our opening brief (at 47-48).

by prohibiting the introduction in subsequent proceedings of any evidence derived from the act of production. If that argument is correct—and respondent has not even attempted to show why it is not, apart from his contentions regarding the protected status of document contents—then there was obviously no justification for quashing the subpoenas.

Second, even if this Court agreed with the court of appeals that the government did not take the procedural steps necessary to offer act of production immunity in the district court, the case should nevertheless be remanded to the district court to afford the government the opportunity to provide such immunity by whatever procedure is determined constitutionally sufficient, as other courts have done. See *United States* v. *Porter*, 711 F.2d 1397, 1405 (7th Cir. 1983); *United States* v. *Doe*, 628 F.2d 694, 697 (1st Cir. 1980); *In re Grand Jury Proceedings (Martinez)*, 626 F.2d 1051, 1058 (1st Cir. 1980). Certainly, the sound administration of justice would not be served by a decision affirming the judgment below on the basis of such a procedural technicality without addressing the underlying issue whether a defendant may resist a subpoena duces tecum on act-of-production grounds despite a procedurally correct grant of act of production immunity. If such a decision were handed down, the grand jury would almost certainly reissue the same subpoenas, the procedurally correct form of immunity would be extended, and the underlying issue would then be squarely presented. Before the issue could again reach this Court, however, this case would likely be moot. It is the rare grand jury case that can survive one, let alone two, trips to this Court without becoming moot.[5]

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[5] Of course, so long as the issue of the sufficiency of act-of-production immunity to secure compliance with the subpoena

3. Respondent contends (Br. 24-25) that the way in which act-of-production use immunity would work is "nebulous." In fact, however, the operation of this immunity is quite simple and does not differ in principle from grants of use immunity for other types of evidence. Act-of-production use immunity[6] would mean that in any subsequent criminal prosecution the government could not introduce against the witness either proof of the act of production itself or any evidence directly or indirectly derived therefrom. See *Kastigar*, 406 U.S. at 441-442. This means that the government would be in the same position as if it had obtained the documents by means other than the defendant's act of production, *i.e.*, as if the documents or tangible objects obtained had been found on the street or had arrived in the mail from an anonymous sender.

As noted (425 U.S. at 410), this Court recognized in *Fisher* that the act of producing documents might be considered testimonial in two ways: by tacitly authenticating them or by conceding their existence and possession by the person upon whom the subpoena is served. With regard to the possibility of tacit au-

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is resolved, it makes relatively little practical difference whether the judgment of the court of appeals is vacated or affirmed, since in the latter event a new subpoena could be issued and enforced on a constitutionally adequate grant of immunity.

[6] If statutory immunity is not required, as we suggest (see Br. 43-46), the immunity would take effect when the witness resisted compliance on the ground that the act of production was protected by the Fifth Amendment privilege and the court, at the government's request, compelled production without rejecting the witness's claim. If statutory immunity is required, then of course immunity would attach as prescribed by statute.

thentication, constructive use immunity would simply mean that proof of the act of production could not be used for authentication purposes in any subsequent proceedings. The documents would have to be authenticated by other means or else they could not be introduced.

Act-of-production use immunity would also mean that the prosecution could not introduce evidence of the act of production or evidence derived therefrom to show that the witness possessed or had control of the items subpoenaed (or, indeed, for any other purpose).[7] For example, if the grand jury subpoenaed

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[7] *Fisher* stated (425 U.S. at 410) (emphasis added) that compliance with a document subpoena "tacitly concedes *the existence of the papers* demanded and their possession or control by the [witness]." Referring to this language, Justice Marshall stated in concurrence (*id.* at 433-434) that act-of-production immunity would have to "extend to the testimony that the document is presently in existence." He continued (*id.* at 434) (footnote omitted) that "[s]uch a grant will effectively shield the contents of the document, for the contents are a direct fruit of the immunized testimony—that the document exists—and cannot usually be obtained without reliance on that testimony." See also Pet. App. 20a n.20. We disagree with this analysis. We will assume that by producing documents a witness in some sense testifies to their existence. We will also assume that such testimony would be covered by a grant of act-of-production immunity. The fact that the government may not make use of that testimony, however, is of absolutely no practical consequence because the act of production is not needed to prove the existence of the documents. If that were true, it would be impossible to prove the existence of documents found on the street or received in the mail from an anonymous sender. In those circumstances, as well as in the case of documents produced pursuant to subpoena, the documents themselves—which are not privileged—prove their own existence.

all of a witness's firearms, the prosecution could not introduce proof of the act of production to show possession by the witness. However, just as in the case of a weapon found on the street, the prosecution would not be barred from proving ownership or possession by inspecting the weapon's serial number or dusting it for fingerprints. Likewise, if, as in this case, the grand jury subpoenaed all of the bank statements of a named sole proprietorship, any ensuing prosecution could not use evidence of the act of production or evidence derived therefrom to prove that the bank accounts belonged to the sole proprietorship. But the documents' unprivileged contents could be used for that purpose.

4. Respondent contends (Br. 24) that the act of production would necessarily incriminate him in the eyes of the grand jury despite a grant of act of production immunity. In our opening brief, we argued (at 45 & n.35) that any significant danger of such self-incrimination could be eliminated by allowing the witness to turn over the documents to a third party —such as the court or prosecutor—who would then furnish them to the grand jury without revealing their origin. We also suggested that a protective order could be entered preventing the government from referring in any way to the act of production in proceedings before the grand jury.[8]

Respondent maintains (Br. 24) that even these safeguards are insufficient because the grand jury, aware of the prior issuance of the subpoena, would infer that the documents had been produced by the witness upon whom the subpoena was served. Whatever validity this argument might have in other cases,

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[8] The grand jury could also be instructed not to speculate or draw any inferences concerning the origin of the records.

it is surely not applicable here, where the subpoenas in question were issued three years ago. The grand jurors who sat at that time have long since been replaced. See Fed. R. Crim. P. 6(g). Moreover, even where the same grand jurors are sitting when the documents are produced, it is highly speculative that they would draw the inference to which respondent refers. The standard business records of a sole proprietorship may be obtained in many ways besides production by the sole proprietor himself. The same documents are frequently sought by subpoenas served on more than one party. They are often secured, either with or without subpoena, from third parties; indeed, respondent himself notes (Br. 8) that "here, many of the documents sought are readily available from other sources such as banks or other financial institutions." Copies of such documents are sometimes produced by employees of the sole proprietorship and are also secured on occasion by means of a search. In sum, respondent's objection about self-incrimination in the eyes of the grand jury is highly exaggerated, because it is speculative that the grand jurors will draw the inference to which respondent objects, because, as noted in our opening brief (at 31-43), the act of producing standard business records has little self-incriminatory potential, and because of the safeguards we have recommended.

In any event, this argument by respondent rests on an unsubstantiated—and, we believe, erroneous—assumption that use by the grand jury for purposes of returning an indictment would be within the proscription of the Fifth Amendment. This Court has never held that the Fifth Amendment privilege protects a witness from being compelled to give testimony that may influence the grand jury to return an indictment,

where that testimony may not be used against him in any way in a subsequent criminal prosecution. The Fifth Amendment provides that "[n]o person shall * * * be compelled *in any criminal case* to be a witness against himself" (emphasis added). This Court's cases makes clear that a grand jury witness—like a witness in a civil trial, administrative proceeding, or legislative hearing—may assert the Fifth Amendment privilege because the witness's self-incriminating testimony could be used against him in a criminal case. Referring to cases allowing a witness in such proceedings to claim the privilege, the Court in *Michigan* v. *Tucker*, 417 U.S. 433, 440-441 (1974), stated:

> The natural concern which underlies many of these decisions is that an inability to protect the right at one stage of a proceeding may make its invocation useless at a later stage. For example, a defendant's right not to be compelled to testify against himself at his own trial might be practically nullified if the prosecution could previously have required him to give evidence against himself before a grand jury.

See also, *e.g.*, *United States* v. *Apfelbaum*, 445 U.S. 115, 125 (1980) (immunity grant does not prevent the use of compelled statements "for any purpose that might cause detriment to the witness other than that resulting from subsequent criminal prosecution"); *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979) ("a defendant's compelled statements * * * may not be put to any testimonial use whatever against him in a criminal trial"); *Maness* v. *Meyers*, 419 U.S. 449, 461 (1975) (privilege "assure[s] that an individual is not compelled to produce evidence which may later be used against him as an accused in a criminal action"); *Kastigar* v. *United*

States, 406 U.S. 441, 445 (1972); *Gardner* v. *Broderick*, 392 U.S. 273, 276 (1968); *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 79 (1964); *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951); *Smith* v. *United States*, 337 U.S. 137, 147 (1949) ("If a witness could not be prosecuted on facts concerning which he testified, the witness could not fairly say he had been compelled in a criminal case to be a witness against himself"); *Brown* v. *Walker*, 161 U.S. 591, 597 (1896).[9] Cf. *United States* v. *Calandra*, 414 U.S. 338, 345 (1974) ("an indictment valid on its face is not subject to challenge on the ground that the grand jury acted * * * on the basis of information obtained in violation of defendant's Fifth Amendment privilege"); *Lawn* v. *United States*, 355 U.S. 339 (1958).

5. Act-of-production use immunity will fully safeguard the Fifth Amendment rights of witnesses served with document subpoenas. It will not shield the contents of preexisting documents. It will, however, fully

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[9] In *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), where this Court first held that a grand jury witness could properly invoke the Fifth Amendment privilege, the Court stated (*id.* at 562) that "[t]he case before the grand jury was * * * a criminal case" within the meaning of the Fifth Amendment. But the Court reached that conclusion only because the witness would have been "liable to prosecution" if he had testified (*ibid.*). In any event, as noted in text, this Court's subsequent cases have made clear that a grand jury witness may invoke the Fifth Amendment privilege not because a grand jury proceeding is itself a criminal case, but because the testimony given might be used in such a case. See, *e.g.*, *Maness* v. *Meyers*, 419 U.S. at 461 (citing *Counselman*); *Michigan* v. *Tucker*, 417 U.S. at 440-441 (citing *Counselman*); *Lefkowitz* v. *Turley*, 414 U.S. at 77-78 (citing *Counselman*).

protect any testimony inherent in the act of production.

Most important, act of production immunity, whether statutory or constructive, will permit access by grand juries to the unprivileged contents of preexisting business records—access that is today blocked based upon the largely theoretical possibility that the act of producing those documents may amount to testimonial self-incrimination. This procedure will thus serve the public's "right to every man's evidence" in the absence of a valid claim of privilege. *Kastigar*, 406 U.S. at 443; see also *Murphy* v. *Waterfront Comm'n*, 378 U.S. at 93-94.

For the foregoing reasons and those set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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